

REIT

Wise[®] 2017

NAREIT's Law, Accounting & Finance Conference

March 22 – 24, 2017

REIT Rivalry



Who's Who



Michael Hurwitz, Marks Paneth LLP

- ❖ Tracy Swearingen, Duke Realty Corporation
- ❖ Olivier Kolpin, Sunstone Hotel Investors, Inc.
- ❖ Roger Laty, UDR, Inc.
- ❖ Greg Imhoff, InfraREIT, Inc.
- ❖ John Napoli, Seyfarth Shaw LLP
- ❖ David Levy, Skadden
- ❖ Lynn Kawaminami, Deloitte Tax LLP
- ❖ Robert Schachat, EY



NAREIT REITWise Locations

Game Show Slide

Diverting Disasters – Loss of REIT Status

Game Show Slide

Preventative Actions to Assist REIT in Operating in a Compliant Manner

- ◆ Educate management team, board of directors, legal, finance, property management, accounting, etc. on operating REIT requirements / compliance tests
- ◆ Implement excess share provisions, limitations on transferring shares and saving clauses
- ◆ Administer and follow-up on property service questionnaires
- ◆ Use taxable REIT subsidiaries
- ◆ Seek private letter rulings
- ◆ Maintain ability to rely on relief provisions – reasonable cause (full opinions / memos / discussions)
- ◆ Include protective return language and elections (e.g., protective trust or protective TRS)
- ◆ Pursue closing agreements



General Operational Requirements

Quarterly Asset Tests

- ◆ Maintain records of investments to support compliance with asset tests each quarter
- ◆ Document methodology for determining asset value (the board of directors' good faith determination) and apply it consistently



Annual Gross Income Tests – leading practice is to test quarterly to reduce chances of surprises

- ◆ If a REIT fails the gross income tests due to mischaracterization of an item of income, the REIT may be able to establish reasonable cause

Annual Distribution Requirement

- ◆ At the beginning of the last quarter of the year, the REIT should estimate its annual income and plan accordingly (planning ideas to be discussed later in presentation)

General Operational Requirements

Recommendations / leading practices:

- ◆ Appoint a designated tax technical REIT Compliance Officer to oversee all REIT compliance issues
- ◆ Annual presentation to the audit committee covering REIT compliance and compliance planning measures
- ◆ Plan regular meetings with tax advisors to plan strategy
- ◆ Proactively advise tax advisors of changes in plans
- ◆ Stay in front of anticipated sales and plan for prohibited transaction safe harbor or other restructuring that may be needed



Excess Share Provisions

REIT's organizational document should:

- ◆ Limit ownership by any shareholder to no more than 9.8% of the REIT's shares, unless approved by the board; and
- ◆ Include an "excess shares" provision that provides that shares transferred in violation of the closely-held prohibition will be irrevocably transferred to a third-party trust (e.g., a charity designated by the board of directors)



Limitations on Transferability

Monitor limitations that jeopardize REIT status, including:

- ◆ Contractual lock-ups
- ◆ Restrictions on transferability, such as consent requirements
- ◆ Golden shares (valuation issues)
- ◆ Shareholder agreements (e.g., puts and calls) and
- ◆ General contractual restrictions

Property Service Questionnaires

Determine whether properties are generating impermissible tenant services income (ITSI) that is not good income for 75% and 95% gross income test

Require regular, periodic questionnaire completion by property managers regarding services and rental arrangements at each property

- ◆ Consider how frequently questionnaires should be completed

Avoid ITSI by use of independent contractors and taxable REIT subsidiaries

- ◆ Consider each service and the appropriate entity to provide it
- ◆ Consult with tax advisors prior to engaging in any new service
- ◆ Evaluate new properties that are acquired - conduct diligence relating to services prior to acquisition

Taxable REIT Subsidiaries

Monitor fair market value of total company assets represented by securities of one or more taxable REIT subsidiaries

- ◆ PATH Act lowers the percentage of the total assets of a REIT that can be represented by securities of a taxable REIT subsidiary from 25% to 20%, effective for tax years after 2017
- ◆ How do you determine value?
- ◆ Can reduce value using third party debt
- ◆ Is this a concern for you and if so, what are you doing now...

Acquiring Interests in Partnerships, Joint Ventures, Other Entities

- ◆ Consider pass-through treatment to REIT of interests it owns in lower tier investment partnerships
- ◆ Negotiate REIT savings provisions in joint venture agreements to operate in compliance with REIT requirements
- ◆ Consider which party will manage / have final authority over decisions regarding acquisitions of assets, distributions of cash, sales of property, etc.
- ◆ Consider whether **tax opinion** or a **private letter ruling** will be needed
- ◆ Consider limitations on ownership of securities of one issuer

Relief Provisions - Reasonable Cause

If a REIT fails to meet one of the asset tests, it will generally have a 30 day grace period available after each quarter end to satisfy the various tests. There is also a rule that would deem the REIT to be in compliance with the asset tests under certain circumstances where non-compliance is due solely to changes in asset values. In the event of a violation of the 5% asset test, 10% vote or 10% value test, the REIT will not lose its status as such if the failure is de minimis (up to the lesser of \$10 million or 1% of its assets) and the REIT disposes of the assets or otherwise complies with the asset tests within six months of the last day of the quarter in which the REIT identified the failure. In the event that any failure is more than a de minimis amount, as long as the failure was due to reasonable cause and not willful neglect, there will be no loss of REIT status so long as the assets are disposed of within six months of the last day of the quarter in which the REIT identified the failure and the REIT pays a tax equal to the greater of \$50 thousand or 35% of the net income from the nonqualifying asset during the period in which it failed to satisfy the asset tests.

If a REIT fails to meet the 75% or 95% gross income test, it will be considered to have satisfied such requirements if, following the identification of such failure, a description of each item of gross income is set forth in a schedule filed in accordance with regulations and such failure is due to reasonable cause and not due to willful neglect. Failure to meet the 75% or 95% gross income tests will be considered due to reasonable cause and not due to willful neglect if the REIT “exercised ordinary business care and prudence in attempting to satisfy the requirements.” However, “failure to meet an income source requirement will be considered due to willful neglect and not due to reasonable cause if the failure is willful and the trust could have avoided such failure by taking actions not inconsistent with ordinary business care and prudence.”

How does one get comfortable with reasonable cause...

Relief Provisions - Reasonable Cause

Treasury Regulation Section 1.856-7(c)(2)(i) provides that “reasonable reliance on a reasoned, **written opinion** as to the characterization for purposes of section 856 of gross income to be derived (or being derived) from a transaction generally constitutes ‘reasonable cause’ if income from that transaction causes the trust to fail to meet the requirements of paragraph (2) or (3) of section 856(c) (or of both paragraphs).”

A **written opinion** means an opinion, in writing, rendered by a tax advisor (including in-house counsel) whose opinion would be relied on by a person exercising ordinary business care and prudence in the circumstances of the particular transaction.

Remedying Failure to Meet Distribution Requirements

Deficiency Dividends: If a “determination” results in an adjustment to REIT items for any tax year, and the REIT must make an additional distribution in order to satisfy the 90% distribution requirement for that year, the REIT can make a deficiency distribution and have it relate back to the earlier taxable year

A “**determination**” is a final decision by a court, a closing agreement, an agreement signed by the IRS and the REIT relating to its tax liability, or a statement by the REIT attached to its return for the relevant tax year

Interest is imposed on the REIT with respect to the deficiency dividend for the period beginning on the last date prescribed for payment of tax for the year for which the determination is made

Consent Dividends: In contrast to a deficiency dividend, a consent dividend is a hypothetical distribution to REIT shareholders out of a REIT’s earnings and profits. The effect of a consent dividend is that shareholders are treated as if such amount had been paid to them in cash and immediately recontributed to the REIT as additional paid-in capital, resulting in phantom income to the shareholders. Consent dividends are not a viable option for publicly traded REITs but are often used in the private REIT space.

Significant Legislation since 1960

Game Show Slide



Regulations and Guidance



- ◆ The Treasury and the IRS have issued final regulations (TD 9810) that reinstate a five-year recognition period for purposes of the built-in gains tax imposed on REITs and RICs under Reg. Section 1.337(d)-7. The preamble to the final regulations indicates that the Treasury and the IRS continue to study other issues addressed in the temporary and proposed regulations issued in June 2016.
- ◆ In PLR 201640007, the IRS ruled that a REIT's proposed sales of its real estate properties under a plan of liquidation will not constitute prohibited transactions under Section 857(b)(6). Accordingly, the REIT will not be subject to the 100% prohibited transaction tax.
- ◆ In PLR 201647005, the IRS ruled that certain senior housing communities, containing both assisted living units and independent living units, owned by a REIT were health care facilities, thereby meeting the definition of "qualified health care properties" under Section 856(e)(6)(D). Accordingly, the REIT may lease the communities to its TRS under the special rule of Section 856(d)(8)(B).
- ◆ In PLRs 201650002 and 201650003, the IRS ruled that a pension trust fund owned by a single entity pension trust fund is not treated as owned by a single qualified trust.

Regulations and Guidance



- ◆ In PLR 201652012, the IRS ruled that the gross income of a REIT from positive Section 481(a) adjustments (resulting from a change in a method of accounting for depreciation and amortization) will not constitute gross income for purposes of the 95% and 75% income tests of Sections 856(c)(2) and (c)(3). In addition, the IRS ruled that, to the extent that the Section 481(a) adjustments exceed the correlative E&P adjustments, any distributions of that excess (that are distributed and treated as dividends in the year in which the excess arises) will be treated as made from E&P. In addition, the IRS ruled that, to the extent that the Section 481(a) adjustments exceed the correlative E&P adjustments, any distributions of that excess (that are distributed and treated as dividends in the year in which the excess arises) will be treated as made from E&P.
- ◆ The IRS has issued final regulations (TD 9784), clarifying the definition of real property for purposes of the REIT provisions. T.D. 9784 is effective August 31, 2016, and adopts, with modifications, the proposed regulations (REG-150760-13) published in the Federal Register on May 14, 2014.
- ◆ In PLR 201620001, the IRS ruled that, for purposes of the 95% and 75% income tests of Sections 856(c)(2) and (3), a REIT may exclude from its gross income its allocable share of management fee income from its OP representing the OP's allocable share of management fee income from a lower-tier partnership (Manager) that received the management fees from the OP for providing management services to the OP. Accordingly, the REIT was not required to include such portion of non-qualifying management fee income in its income tests.

Regulations and Guidance



- ◆ In PLR 201628009, the IRS ruled that permanently moored casino barges and riverboats constitute qualifying real property for purposes of the REIT income and asset tests.
- ◆ In PLR 201628020, the IRS ruled that amounts received by a REIT from the provision of parking spaces in its parking garage, in part, to the tenants of the REIT's office building and, in part, to a third-party owner of an adjacent building under a long-term lease constitute qualifying rents from real property. PLR 201628021 appears to address the same facts as PLR 201628020 for another REIT investor in the partnerships and concludes consistently.
- ◆ The Treasury and the IRS have issued temporary and proposed regulations that amend the built-in gains tax rules under Regulation Section 1.337(d)-7 to require immediate taxation with regard to certain transactions. In addition, the regulations impose a 10-year recognition period, rather than the 5-year recognition period, for conversion transactions occurring on or after August 8, 2016.

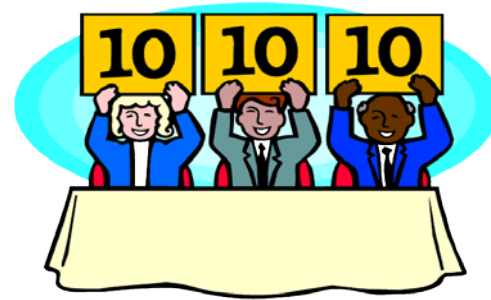
Potential Legislative Changes

- ◆ Reduction in corporate and individual income tax rate and / or tax rate on corporate dividends
- ◆ Immediate expensing of capital assets and as a trade off a limit on interest deductions
- ◆ Extend net operating loss carryforwards and / or eliminate carrybacks
- ◆ Tax on imports (no basis for cost of goods) / non-taxation of exports
- ◆ Eliminate step-up in basis on death (with elimination of estate tax)
- ◆ Repeal of section 1031 like-kind exchanges
- ◆ Repeal alternative minimum tax
- ◆ Earnings and profits modifications

Note – states may not follow in step very quickly; as such tax departments need to stay on top of these issues

Attributes of a Director of Taxation

Game Show Slide



Director of Taxation

Who do you work for?

- ◆ Senior management
- ◆ Board of directors
- ◆ Other departments in the company
- ◆ Your staff

Who works for you?

- ◆ Your staff
- ◆ CPA / legal / advisory / valuation Firms
- ◆ Other departments in the company

How do you communicate?

- ◆ Keep it simple – the “3 minute rule”
- ◆ Keep it in simple English
- ◆ Formal meeting, informal conversation and / or electronically
- ◆ Be honest and forthright; it’s okay to say “I don’t know”!

What do you communicate?

- ◆ New laws and regulations
- ◆ Capital market transactions
- ◆ Organizational structures
- ◆ REIT tests
- ◆ Other (e.g., goals and how tax is addressing overall company initiatives)



Partner Communications

Schedules K-1

- ◆ State apportionment
- ◆ Unrelated business taxable income
- ◆ Other useful information

Nonresident Withholding

- ◆ Requirements
- ◆ Statements to limited partners

Tax Law Changes / New Regulations

- ◆ Summary
- ◆ Individual partner information
- ◆ Example: bottom dollar guarantees

Use of Technology

- ◆ Web-based portal

Schedule K-1 (Form 1065)

Department of the Treasury
Internal Revenue Service

2016

For calendar year 2016, or tax
year beginning _____, 2016
ending _____, 20_____

Partner's Share of Income, Deductions, Credits, etc.

▶ See back of form and separate instructions.

Part I Information About the Partnership

A	Partnership's employer identification number
B	Partnership's name, address, city, state, and ZIP code
C	IRS Center where partnership filed return
D	<input type="checkbox"/> Check if this is a publicly traded partnership (PTP)

Part II Information About the Partner

E	Partner's identifying number
F	Partner's name, address, city, state, and ZIP code
G	<input type="checkbox"/> General partner or LLC member-manager <input type="checkbox"/> Limited partner or other LLC member
H	<input type="checkbox"/> Domestic partner <input type="checkbox"/> Foreign partner

Is this partner?

651113
OMB No. 1545-0123

Final K-1 Amended K-1

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items		
1	Ordinary business income (loss)	15 Credits
2	Net rental real estate income (loss)	
3	Other net rental income (loss)	16 Foreign transactions
4	Guaranteed payments	
5	Interest income	
6a	Ordinary dividends	
6b	Qualified dividends	
7	Royalties	
8	Net short-term capital gain (loss)	
9a	Net long-term capital gain (loss)	17 Alternative minimum tax (AMT) items
9b	Collectibles (28%) gain (loss)	
9c	Unrecaptured section 1250 gain	
10	Net section 1231 gain (loss)	18 Tax-exempt income and nondeductible expenses
11	Other income (loss)	
		19 Distributions

Development / Improvement Exchanges

Overview:

- ◆ Improvements are constructed by an “Exchange Accommodation Titleholder” or “EAT” on land or an “interest in land” owned by the EAT
- ◆ Land and constructed improvements sold to taxpayer as replacement property in a Section 1031 Exchange

EAT typically purchases the property on which development will occur and builds improvements with Taxpayer acting as Project Manager

- ◆ Safe Harbor vs. Non-Safe Harbor under Rev. Proc. 2000-37 (180 day limitation)
- ◆ In PLRs 201408019 and 200251008, EAT acquired an “interest in land” via a long term ground lease from an affiliate of taxpayer

Practical Traps and Challenges

- ◆ Development costs paid by EAT should be reviewed to make sure they qualify (e.g., uninstalled structural steel);
- ◆ Non-qualifying development costs paid directly by taxpayer
- ◆ Development team heavily involved for explanations of costs, spend projections, processing payments from QI, etc.
- ◆ Cut-off issues (mid-month costs, final general contractor bill during Section 1031 period, etc.)

REIT Transfer Pricing

Section 482 allows the IRS to adjust income between related taxpayers and to assess tax on the adjustment

- ◆ Example: If party A was underpaid by \$100, Section 482 would allocate \$100 of additional income to party A and tax would be assessed on the adjusted amount using party A's applicable tax rate.

Section 857(b)(7) applies “in lieu of” of Section 482 and imposes a 100 percent tax on the following items:

- ◆ Redetermined Rents - amounts included by REIT as rental income but which, under Section 482, should have been treated as TRS income attributable to services provided by TRS to tenants of REIT
 - Note that the 100 percent tax does not apply to redetermined rents if statutory safe harbors are satisfied, but Section 482 can still apply (see Section 857(b)(7)(B)(ii)-(vi); Rev. Rul. 2002-38)
- ◆ Redetermined Deductions - amounts deducted by TRS but which, under Section 482, would be reduced
- ◆ Redetermined TRS Service Income - amount by which TRS's gross income attributable to services provided to, or on behalf of the REIT, would be increased under Section 482
- ◆ Excess Interest - amount of deductions by TRS for interest payments to REIT to the extent such amount exceeds a commercially reasonable interest rate

Standards applicable to determining appropriateness of REIT-TRS allocations

- ◆ Section 482: arm's length standard (see Section 482 regulations for applicable methods)
- ◆ Section 857(b)(7)(G): any reasonable method
- ◆ As a practical matter, relying on Section 482 principles is safest approach
- ◆ See *Bagley v. U.S.*, 114 AFTR 2d 2014-5671, where Ninth Circuit U.S. Bankruptcy Appellate Panel suggested that REIT-TRS allocations must always comply with Section 482, notwithstanding the “any reasonable method” language in Section 857(b)(7)(G)

Cost Sharing and Common Paymaster Arrangements

REIT/TRS groups commonly have a pool of employees performing activities for both the REIT and TRS. Using an employee and cost sharing arrangement or a common paymaster agreement may reduce administrative burden without giving rise to gross income.

Employee and cost sharing arrangement

- ◆ Employees employed at either REIT or TRS (e.g., PLR 200525013, PLR 20150310)
- ◆ Employing entity handles employee-related administrative issues (e.g., payroll, tax withholding)
- ◆ Employing entity permits the employees to perform activities on behalf of the other entity in exchange for a reimbursement of related costs (i.e., not a services arrangement)
- ◆ Arrangement can cover non-employee costs (e.g., insurance)
- ◆ Caveat: If the entity receiving the reimbursement is in the business of performing the reimbursed activities to third parties for profit, the amount reimbursed may be treated as gross income (see *Jergens Co.*, 40 BTA 868 (1939))

Common paymaster agreement

- ◆ Employees concurrently employed by each of REIT and TRS
- ◆ One entity is designated as the “common paymaster” (under Sections 3121 and 3306) charged with handling employee-related administrative issues
- ◆ Common paymaster entity can be in the business of performing the services for profit
- ◆ Caveats: only works for members of a controlled group of corporations (technically speaking, cannot use common paymaster in OP structures). May be administratively more complicated than cost sharing and covers only salary expense (still need cost sharing arrangement for non-salary costs)

Other REIT - TRS Arrangements

TRS services arrangements

- ◆ Different from cost sharing or common paymaster arrangements:
 - Cost sharing and common paymaster arrangements effectively allocate costs and functions between REIT and TRS, and each party is treated as directly incurring the underlying costs relating to its own activities
 - Services arrangements generally provide that the TRS uses its employees (or employees advanced to it by the REIT) to perform activities for or on behalf of the REIT in exchange for a service fee
- ◆ Appropriate in situations such as:
 - TRS is performing services on behalf of the REIT that the REIT cannot itself perform (e.g., providing non-customary services to tenants of the REIT)
 - TRS is employer entity for the REIT/TRS group but cost sharing is not available because TRS is in the business of performing certain activities for profit
- ◆ TRS likely required to earn a profit in order to avoid redetermined TRS service income and 100% tax; however, certain expenses may qualify to be charged at cost without a markup

Cash management / financing arrangements

- ◆ Cash management arrangements are advisable where one party is collecting amounts that are due to the other party (e.g., REIT collecting amounts for non-customary tenant services to be paid to TRS)
- ◆ Interest rates charged in any cash management or other financing instruments should be arm's length: Treas. Reg. § 1.482-2(a)(2) safe harbor rate (100-130% of AFR) or market rate. It is advisable to support the amount of debt and rate with a debt capacity analysis.

Tips for REIT - TRS Transfer Pricing

Consistently maintain separate books and records for REIT and TRS

REIT and TRS should enter into intercompany agreements covering key transactions

- ◆ Reflect the actual conduct of the parties
- ◆ Transaction should be described in manner consistent with tax characterization; for example, a cost sharing arrangement should not be described as a services arrangement
- ◆ Build in flexibility to prevent agreements from becoming outdated due to minor operational changes, e.g.,:
 - Change in timing of payments
 - Addition or subtraction of covered activities/services
 - Change in allocation method due to varied circumstances
- ◆ Update agreements as necessary based on significant operational changes

Transfer pricing methodology and audit-ready documentation

- ◆ Consider using safe harbors where available
- ◆ Cost allocation keys should be as objective as possible:
 - Easier to defend an allocation based on objective data than to defend based on management judgment
 - However, some degree of judgment is appropriate for some types of costs (e.g., allocation of employee costs based on estimates of time spent)
- ◆ Prepare contemporaneous documentation supporting the transfer pricing results, which may include:
 - Process memos explaining how allocations were determined
 - Economic studies supporting TRS profit margin or comparable transaction-based pricing
 - Section 6662 transfer pricing studies

Consider retaining a service provider that isn't the REIT's auditor or primary tax adviser to perform the study so as to bolster the credibility and eliminate any potential for conflict of interest issues in the final report

Managing Cash Flow

Game Show Slide

Distribution and Taxable Income Planning

- ◆ Know your company's goals
- ◆ Plan for potential gains and extraordinary transactions
- ◆ Understand your levers for increasing and decreasing taxable income
- ◆ Don't forget to consider available distribution options
- ◆ Stay nimble – it's more important now than ever



Know Your Company's Goals

- ◆ Is there a plan to increase or decrease the dividend?
- ◆ Is a return of capital acceptable or desired?
- ◆ If you have REIT NOL carryforwards, do you want to preserve them?
- ◆ Is an elective stock dividend an option your company would consider?
- ◆ Are there business objectives that are currently hampered by the distribution requirement – e.g., paying dividends from subsidiaries?

Plan for Potential Gains and Extraordinary Transactions

- ◆ Is gain deferral desired?
 - Like-kind exchanges
 - Partnership transactions (less useful now)
 - Deferred financing leases
 - Installment sales

- ◆ Are other transactions anticipated that may change your decision – e.g., buyback of bonds, write-off of an investment, large settlement payment?

Don't Forget to Consider Available Distribution Options

- ◆ Elective cash / stock dividends
- ◆ Use of REIT NOLs
- ◆ Retain REIT taxable income and pay tax on the 10%
- ◆ Retain capital gains, pay tax at 35%, and pass the gain and credit for tax to shareholders
- ◆ Throw back dividends under section 858(a), but monitor potential 4% excise tax
- ◆ Spillover dividends under section 857(b)(9)

Understand Your Levers for Increasing and Decreasing Taxable Income

- ◆ Tangible property regulations
- ◆ Cost segregation studies
- ◆ Depreciation methods
- ◆ Dividends from TRSs
- ◆ Fixed bonus accrual
- ◆ And the list goes on...

Stay Nimble - It's More Important Now Than Ever

- ◆ Tax reform is heating up – many potential changes can have a significant impact on REITs and the real estate industry
- ◆ Potential significant changes include:
 - expensing of non-land capital expenditures
 - repeal of like-kind exchanges
 - elimination of deduction for net interest expense
 - territorial income tax system
 - rate changes, including different tax rates on partnership income
- ◆ Savvy tax departments will want to stay ahead of the curve

Final thoughts



Michael Hurwitz



- ❖ Tracy Swearingen
- ❖ Olivier Kolpin
- ❖ Roger Laty
- ❖ Greg Imhoff
- ❖ John Napoli
- ❖ David Levy
- ❖ Lynn Kawaminami
- ❖ Robert Schachat



About this presentation

This presentation contains general information only and the respective speakers and their firms are not, by means of this presentation, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This presentation is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. The respective speakers and their firms shall not be responsible for any loss sustained by any person who relies on this presentation.

REIT

Wise[®] 2017

NAREIT's Law, Accounting & Finance Conference



Happy Hour

